

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

## INTRODUCTION AND SUMMARY CONCLUSION

<sup>1</sup> Plaintiff filed an amended complaint on July 14, 2009, and a second amended

01 M.D., Medical Officer Maria Dy, M.D., Health Services Administrator Tita Iturralde, and  
02 former Warden Robert Palmquist as defendants in this action.

03 Defendants now move for summary judgment. Plaintiff, despite having been advised  
04 of the summary judgment requirements pursuant to *Rand v. Rowland*, 154 F.3d 952 (9th Cir.  
05 1998), has filed no response to defendants' motion for summary judgment. This Court, having  
06 reviewed defendants' motion, and the balance of the record, concludes that defendants' motion  
07 for summary judgment should be granted, and this action should be dismissed with prejudice.

08 FACTS

09 Plaintiff alleges in his second amended complaint that from December 3, 2007, through  
10 February 29, 2008, and again from November 25, 2008, through February 13, 2009, defendants  
11 denied him medical treatment and effective pain medication for his chronic and debilitating  
12 neck and lower back pain. (Dkt. No. 16 at 6.) During the periods in question, plaintiff was  
13 housed at FDC SeaTac as a result of supervised release violations which arose out of plaintiff's  
14 2002 conviction for carrying and possessing a firearm in furtherance of a drug trafficking  
15 crime.<sup>2</sup> (Dkt. No. 26 at 2.)

16  
17 complaint on July 20, 2009. (See Dkt. Nos. 13 and 16.) The pleadings themselves are  
18 essentially the same. However, plaintiff submitted a series of exhibits with his second  
19 amended complaint which he did not include with his first amended complaint, even though the  
20 exhibits were referenced in the first pleading. Because the second submission is more  
21 complete, the Court deems the second amended complaint, and attached exhibits, to be the  
22 pleading at issue in this action.

<sup>2</sup> Plaintiff was originally sentenced to a term of 60 months incarceration to be followed  
by a three year term of supervised release. (See Dkt. No. 26 at 2.) Plaintiff completed his  
original term of incarceration on May 15, 2007. (*Id.*) However, he was thereafter returned to  
custody three times for violating the terms of his supervised release. (*Id.*) Each of the three  
violations involved the consumption of illegal drugs. (*Id.* at 3-4.)

01 When plaintiff arrived at FDC SeaTac on December 3, 2007, following his arrest for  
02 violating the terms of his supervised release, Mid-Level Practitioner Manuell Lacist (“MLP  
03 Lacist”) completed an intake health screening for plaintiff. (Dkt. No. 27-2 at 27-32.) The  
04 intake screening form noted that plaintiff suffered from chronic back pain, that he had a history  
05 of substance abuse, and that he was going through opiate withdrawal. (*See id.* at 30-31.)  
06 Plaintiff was prescribed medication for opiate withdrawal and Motrin for his back pain. (*Id.* at  
07 27 and 31.) The record indicates that Dr. Dy reviewed the intake screening completed by MLP  
08 Lacist and gave verbal orders authorizing the medication for opiate withdrawal. (*See* Dkt. No.  
09 27 at 1-2; Dkt. No. 27-2 at 27 and 31-32.)

10 On December 11, 2007, plaintiff appeared at sick call complaining of low back pain.  
11 (*See* Dkt. No. 27-2 at 24.) Plaintiff was evaluated on that occasion by Physician Assistant  
12 Stephen Leaf (“PA Leaf”). (*See id.*) The notes of that clinical encounter indicate that  
13 plaintiff had been tapered off of narcotic medications and that Ibuprofen was not helping. The  
14 notes further indicate that plaintiff had problems with heroin addiction and was constantly  
15 self-medicating for pain. (*Id.*) At that time, plaintiff was prescribed two new medications for  
16 pain, Salsalate and Amitriptyline. (*Id.* at 25.) Dr. Dy co-signed the clinical encounter report.  
17 (*Id.*)

18 Plaintiff was evaluated again by PA Leaf on December 15, 2007, for complaints of low  
19 back pain, and Dr. Dy again co-signed plaintiff’s chart. (Dkt. No. 27-2 at 22.) It is not clear  
20 what additional treatment, if any, plaintiff received at that time. However, on December 21,  
21 2007, in response to continued complaints of back pain, Dr. Dy ordered that the dosage of  
22 plaintiff’s pain medication, Amitriptyline, be increased. (*See* Dkt. No. 27 at 2; Dkt. No. 27-2

01 at 22.)

02 On January 8, 2008, plaintiff filled out an Inmate Request to Staff form in which he  
03 complained that he was being denied medication that had previously been prescribed for his  
04 back pain, “Morphen 30 mg,” and that the medication he had been provided, Ibuprofen and  
05 Salsalate, didn’t work. (Dkt. No. 16-2 at 58.) It is not clear who, specifically, the request was  
06 directed to, but it does appear clear that it was directed to the medical staff. (*See id.*) It is also  
07 unclear whether anyone at FDC SeaTac ever responded to that request.

08 On January 22, 2008, plaintiff submitted a request for administrative remedy in which  
09 he asked that he be “switched back” to Morphen Sulfate, 30 mg, because the pain medication he  
10 had been prescribed was not working. (*See* Dkt. No. 16-2 at 60.) On February 13, 2008,  
11 plaintiff again appeared at sick call complaining of neck, arm, and back pain. (*See* Dkt. No.  
12 27-2 at 20-21.) MLP Lacist evaluated plaintiff on that date. It appears that plaintiff was  
13 evaluated by Dr. Dy as well. (*Id.* at 21.) At that time, plaintiff was prescribed  
14 Oxycodone/Acetaminophen for pain, and a radiological consult was ordered. (*Id.*) The  
15 radiologic report, which was prepared on February 14, 2008, concluded that there were  
16 degenerative changes of plaintiff’s cervical spine and the lumbar spine. (*Id.* at 19.)

17 On February 26, 2008, Warden Palmquist responded to plaintiff’s January 22, 2008,  
18 request for administrative remedy. (*See* Dkt. No. 16-2 at 61.) The Warden indicated therein  
19 that plaintiff’s request to be placed on Morphen Sulfate, 30 mg, had been disapproved by the  
20 acting Clinical Director because it was not clinically indicated. (*Id.*) The Warden also noted  
21 that plaintiff had recently been prescribed Oxycodone/Acetaminophen for pain, and that  
22 plaintiff had been prescribed Ibuprofen for pain as well. (Dkt. No. 16-2 at 61.) The Warden

01 concluded that plaintiff was being provided adequate medical care and therefore denied  
02 plaintiff's request for administrative remedy. (*Id.*)

03 On February 22, 2008, plaintiff completed an informal resolution attempt form in which  
04 he complained that he was not receiving proper medical attention or proper medication for his  
05 back pain. (*Id.* at 62.) The staff response to plaintiff's complaint was that plaintiff had been  
06 given the proper medication for pain and that the medical staff would not prescribe narcotics for  
07 plaintiff's pain. (*Id.*) Plaintiff thereafter submitted a request for administrative remedy in  
08 which he again complained that he was not getting any medical attention for his back injuries  
09 and that he was in severe pain. (*Id.* at 63.) Plaintiff requested that he "be seen by a doctor that  
10 can treat my condition." (*Id.*)

11 On March 4, 2008, Warden Palmquist responded to plaintiff's request for  
12 administrative remedy. (*Id.* at 64.) The Warden noted in his response that plaintiff had been  
13 seen by medical staff several times for complaints regarding his back injury and back pain.  
14 (*Id.*) The Warden further noted that plaintiff had been told by the doctor that his pain  
15 medication would not increase and that he would not be prescribed narcotics. (*Id.*) It appears  
16 that plaintiff had already been transferred out of FDC SeaTac by the time Warden Palmquist  
17 issued his response. (*See* Dkt. No. 26, Attachment A at 1.)

18 On November 26, 2008, when plaintiff returned to FDC SeaTac after again violating the  
19 conditions of his supervised release, MLP Lacist completed another intake health screening for  
20 plaintiff. (*See* Dkt. No. 26 at 4; Dkt. No. 27-2 at 13-18.) During that screening, plaintiff  
21 reported that he had pain in the cervical spine. (Dkt. No. 27-2 at 15.) Plaintiff was prescribed  
22 Oxycodone/Acetaminophen and Ibuprofen to manage the pain. (*See* Dkt. No. 27-2 at 17.)

01 Dr. Dy, it appears, reviewed and co-signed plaintiff's intake screening. (*Id.* at 18.)

02 On November 28, 2008, plaintiff submitted a sick call sign up form in which he  
03 requested to be seen by a doctor because the pain medication he was on was not having any  
04 lasting effect on the pain. (Dkt. No. 16-2 at 2.) Plaintiff was seen at sick call on December 8,  
05 2008, where he complained about pain in his neck, left arm, and lower back and requested that  
06 stronger pain medication be prescribed. (*See* Dkt. No. 28-2 at 2-3.) Plaintiff was evaluated  
07 by MLP Lacist who then referred plaintiff to Dr. Aslam for re-evaluation of his chronic cervical  
08 and lower back pain. (*Id.* at 4.)

09 According to Dr. Aslam, when he observed plaintiff on December 8, 2008, plaintiff did  
10 not appear to be in pain. (Dkt. No. 28 at 2.) Dr. Aslam concedes, however, that assessing  
11 pain can be highly subjective. (*Id.* at 2.) Dr. Aslam's notes of the December 8, 2008,  
12 evaluation describe plaintiff's history of intravenous drug abuse, opiate addiction, and other  
13 substance abuse. (Dkt. No. 28-2 at 1.) Dr. Aslam's notes also reflect that he gave plaintiff the  
14 option of choosing from among three other medications which are used to address chronic pain:  
15 Amitriptyline, Nortriptyline, and Carbamazepine, but plaintiff refused all of them, indicating  
16 that he would instead pursue his administrative remedies and lawsuits in order to obtain  
17 Oxycontin. (*Id.*) Dr. Aslam also advised plaintiff during the December 8, 2008, consult that  
18 he was scheduled to see a neurosurgeon. (Dkt. No. 28 at 2.)

19 The record reflects that between December 9, 2008 and February 8, 2009, plaintiff  
20 submitted no fewer than sixteen inmate request to staff forms and six sick call sign up forms  
21 complaining about his back pain and/or the ineffectiveness of the pain medication he was being  
22 provided. (*See* Dkt. No. 16-2.)

On January 6, 2009, plaintiff was seen by neurologist Dr. Zhu, for a neurological consult.<sup>3</sup> (Dkt. No. 28 at 2.) After reviewing the MRI of plaintiff's cervical spine, Dr. Zhu recommended that plaintiff be seen by a neurosurgeon. (Dkt. No. 16-2 at 42.) According to both Dr. Dy and Dr. Aslam, after reviewing Dr. Zhu's recommendations, it was their intent to have plaintiff evaluated by a neurosurgeon. (See Dkt. No. 27 at 2, Dkt. No. 28 at 2.) And, in fact, it appears that Dr. Dy completed a neurosurgery consultation request on January 26, 2009. (See Dkt. No. 16-2 at 43.) However, plaintiff was transferred out of FDC SeaTac before he could be seen by a neurosurgeon. (Dkt. No. 28 at 2.)

## DISCUSSION

### Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Genuine disputes are those for which the evidence is such that a "reasonable jury could return a verdict for the nonmoving party." *Id.* Material facts are those which might affect the outcome of the suit under governing law. *Id.*

In response to a properly supported summary judgment motion, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts

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<sup>3</sup> While a neurosurgery consult had originally been ordered, Dr. Aslam explains that the group practice that was to see plaintiff required that a Bureau of Prisons ("BOP") referral first be evaluated by the practice's neurologist. (Dkt. No. 28 at 2.)

01 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the  
02 existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of  
03 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling  
04 on a motion for summary judgment, the court is required to draw all inferences in a light most  
05 favorable to the non-moving party. *Id.* at 248. The court may not weigh the evidence or make  
06 credibility determinations. *Id.*

#### 07 Eighth Amendment Claim

08 The Eighth Amendment imposes a duty upon prison officials to provide humane  
09 conditions of confinement. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). This duty  
10 includes ensuring that inmates receive adequate medical care.<sup>4</sup> *Id.* In order to establish an  
11 Eighth Amendment violation, a prisoner must satisfy a two-part test containing both an  
12 objective and a subjective component. The Eighth Amendment standard requires proof that  
13 (1) the alleged wrongdoing was objectively "harmful enough" to establish a constitutional  
14 violation; and (2) the prison official acted with a sufficiently culpable state of mind. *Farmer*,  
15 511 U.S. at 834.

16 The objective component of an Eighth Amendment claim is "contextual and responsive  
17 to 'contemporary standards of decency'" *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting  
18 *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). The state of mind requirement under the  
19 subjective component of the Eighth Amendment standard has been defined as "deliberate

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20 <sup>4</sup> It appears from the record that plaintiff may have been a pretrial detainee during some,  
21 but not all, of the time at issue in this action. Claims of inadequate medical care asserted by a  
22 pretrial detainee arise under the Due Process Clause of the Fourteenth Amendment and not  
under the Eighth Amendment. *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996).  
However, Eighth Amendment standards are still applicable to such claims. *See id.*



01 indifference" to an inmate's health or safety. *Farmer*, 511 U.S. at 834. Under the "deliberate  
02 indifference" standard, a prison official cannot be found liable for denying an inmate humane  
03 conditions of confinement unless the official knows of and disregards an excessive risk to  
04 inmate health or safety. *Id.* at 837.

05 Defendants argue in their summary judgment motion that plaintiff has not demonstrated  
06 that they were deliberately indifferent to a serious medical need and, thus, that plaintiff's Eighth  
07 Amendment claim must be dismissed. Defendants offer in support of their summary judgment  
08 motion affidavits of both Dr. Dy and Dr. Aslam, as well as copies of plaintiff's relevant medical  
09 records. Plaintiff has not responded in any fashion to defendants' summary judgment motion.  
10 Plaintiff did, however, submit in support of his second amended complaint a series of  
11 documents which he identifies as "plaintiff's evidence." This "evidence" consists of Sick Call  
12 Sign Up forms, Inmate Request to Staff Member forms, medical records, and forms related to  
13 his efforts to pursue administrative remedies with respect to the claims at issue here.

14 It is clear from plaintiff's documentation that he made repeated complaints regarding  
15 his neck and back pain to his medical providers and to others at FDC SeaTac, and that he was  
16 persistent in his requests for new medication to more effectively manage his pain, particularly  
17 during the period from November 26, 2008 to February 13, 2009. However, defendants'  
18 evidence establishes that plaintiff did receive treatment for his neck and back pain during both  
19 of the periods of time in question, it was simply not the treatment he wanted.

20 Dr. Aslam states in his affidavit that, in his clinical judgment, the medication which  
21 plaintiff was seeking, OxyContin, was counter-indicated because it is a highly addictive  
22 narcotic and plaintiff had a history of substance abuse. (Dkt. No. 28 at 2.) Dr. Aslam

01 explains that “[i]n light of [plaintiff’s] history, the last thing he needed was to try to fight a  
02 narcotics addiction because of the potential for abuse and availability of other less addictive and  
03 dangerous alternatives.” (Dkt. No. 28 at 2.) Dr. Aslam also states in his affidavit that other  
04 medications were offered to plaintiff to address his pain, but plaintiff refused those  
05 medications. (*Id.*)

06 It is well established that differing opinions on medical treatment do not amount to a  
07 violation under the Eighth Amendment. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)  
08 (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)). In order to prevail on an Eighth  
09 Amendment claim in these circumstances, a plaintiff must show “that the course of treatment  
10 the doctors chose was medically unacceptable under the circumstances . . . and . . . that they  
11 chose this course in conscious disregard of an excessive risk to plaintiff’s health.” *Jackson*, 90  
12 F.3d at 332 (citations omitted).

13 While plaintiff was clearly dissatisfied with the manner in which defendants addressed  
14 his chronic neck and back pain, he offers no evidence demonstrating that the course of  
15 treatment chosen by defendants was medically unacceptable or that decisions made regarding  
16 plaintiff’s course of treatment were made in conscious disregard of an excessive risk to  
17 plaintiff’s health. Accordingly, defendants are entitled to summary judgment with respect to  
18 plaintiff’s claim that they provided inadequate medical care.

#### 19 CONCLUSION

20 For the reasons set forth above, this Court recommends that defendants’ motion for  
21 summary judgment be granted and that plaintiff’s second amended complaint, and this action,  
22 be dismissed with prejudice. A proposed order accompanies this Report and

01 Recommendation.

02 DATED this 25th day of June, 2010.

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05 Mary Alice Theiler  
06 United States Magistrate Judge  
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